A

NBH SDN BHD

v.

TANJUNG BALAI QUARRY SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: S6-22-466-2005]
13 SEPTEMBER 2013

C ***CIVIL PROCEDURE:*** *Amendment - Order - Application to amend order - Claim for judgment sum including post-judgment interest - Claim allowed but no provision nor mention on post-judgment interest made in grounds of judgment and order - Whether plaintiff entitled to post-judgment interest - Whether order could be amended to insert additional*
D *clause requiring defendant to pay post-judgment interest - 'Slip rule' - Whether application within scope of slip rule - Whether accidental omission in judgment could be corrected under slip rule by judge who did not pronounce it - Rules of Court 2012, O. 20 r. 11*

E ***CIVIL PROCEDURE:*** *Res judicata - Principles - Claim for judgment sum including post-judgment interest - Claim allowed but no provision nor mention on post-judgment interest made in grounds of judgment and order - Defendant's refusal to pay post-judgment interest - Application to amend order to insert additional clause requiring defendant to pay post-judgment*
F *interest - Whether application barred by doctrine of res judicata*

A contractual dispute arose between the plaintiff and the defendant. The plaintiff claimed for, *inter alia*, judgment sum which included interest at 8% per annum ('the 8% post-judgment interest') against the latter, in the High Court. The High Court
G Judge ('Abdul Wahab J') ordered the defendant to pay the sum of RM231,349.56 to the plaintiff ('the said order') but made no provision nor mention on post-judgment interest in the grounds of judgment and the said order. The statutory notice under s. 218 of the Companies Act 1965, which included the 8% post-judgment
H interest was served to the defendant but the defendant only made payment for the sum of RM231,349.56 as per the said order and declined to pay the 8% post-judgment interest amounting to RM44,114.88, averring that the plaintiff was not entitled to demand the said amount since it was not awarded by Abdul
I Wahab J. The defendant then proceeded to file for an injunction

to restrain the plaintiff from presenting a winding-up petition on the basis that the s. 218 notice was defective for making a demand which was not in accord with the said order. The defendant's injunction application was allowed by the High Court Judge ('John Louis O'Hara J'). Hence, in the present application, the plaintiff sought to amend the said order, pursuant to the 'slip rule' in O. 20 r. 11 of the Rules of Court 2012 ('ROC'), by inserting an additional clause requiring the defendant to pay the 8% post-judgment interest. In opposing the plaintiff's application, the defendant argued that (i) the present application was barred by the doctrine of *res judicata* as John Louis O'Hara J had already decided that the plaintiff was not entitled to claim interest; and (ii) the application did not come within the scope of the slip rule as the said order expressed the intention of the court. The issue that arose for determination was whether an accidental omission in a judgment can be corrected under the slip rule by a judge who did not pronounce it.

Held (allowing application):

(1) It is trite that a plea of *res judicata* is based on the principle that a person is not to be permitted to litigate, for a second time, what had already been decided against him in another case. However, the principle of *res judicata* had no application to the factual matrix of the present case. This was a case where the plaintiff sought to raise an issue for the first time that it was entitled to claim post-judgment interest on the judgment sum under the slip rule on the ground of accidental omission. John Louis O'Hara J did not consider whether it was permissible for the plaintiff to amend its judgment under the slip rule to claim interest as prayed for in the statement of claim. There was no adjudication on the issue of the plaintiff's claim for interest, there being only a denial of interest based on the order as drawn up. (paras 19 & 20)

(2) There was no indication anywhere in Abdul Wahab J's judgment that His Lordship had considered and refused an award of interest. It was clear that the present court had the power to correct the judgment to allow the plaintiff as the successful party to the suit to interest on the judgment sum as it was apparent from the records that it was not considered and disallowed. (para 21)

(3) Whilst it would be far better for an application to correct a judgment based on an accidental omission to be heard by the same judge who made the order, there might be instances when he or she would not be available. If the judge who made the order is not available due to retirement or transfer or other reasons, the ends of justice demand that a different judge must have the jurisdiction to hear the application as otherwise, the judgment would remain uncorrected and in some circumstances, unenforceable. There is nothing in O. 20 r. 11 of the ROC which expressly or impliedly prohibits a different judge from hearing the application and doing the needful to correct what is an obvious error or omission. Order 20 r. 11 of the ROC refers to 'the court' and not the same judge. On the facts, since the trial judge had been elevated to the Court of Appeal, there was no legal impediment which existed to prevent this court from hearing the application. (paras 23 & 24)

Case(s) referred to:

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(not foll)***

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665 CA ***(refd)***

Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd [1998] 1 LNS 336 HC ***(refd)***

Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd [1994] 1 CLJ 412 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218
National Land Code, s. 257(1)
Rules of Court 2012, O. 20 r. 11
Rules of the High Court 1980, O. 42 r. 12

For the plaintiff - Oommen Koshy; M/s Skrine & Co
For the defendant - Geeta Krishna Dallumah; M/s Gan Partnership

Reported by Najib Tamby

JUDGMENT

SM Komathy Suppiah JC:

[1] This application raises an issue of some practical importance. Whether an accidental omission in a judgment can be corrected under the slip rule by a judge who did not pronounce it? By this

application, the plaintiff applied pursuant to the 'slip rule' in O. 20 r. 11 of the Rules of Court 2012 ("ROC") to amend the order of the High Court dated 6 October 2009 granted by Abdul Wahab Patail J.

[2] The plaintiff seeks to amend the said order by inserting an additional clause in the order requiring the defendant to pay post-judgment interest of 8% on the judgment sum of RM231,349.56 granted by the court.

Salient Facts

[3] The plaintiff filed the writ and statement of claim herein against the defendant on 25 April 2005 arising from a contractual dispute between parties.

[4] By a re-amended statement of claim the plaintiff sought the following prayers:

(i) Judgment for the sum of RM1,071,785.04;

(ii) Judgment for the sum of RM1,393,652.90;

(iii) Judgment for the sum of RM1,016,198.84;

(iv) Judgment for the sum of RM1,724,388.27;

(v) In alternative to prayer (ii), (iii) and (iv) general damages to be assessed;

(vi) Interest for prayers (i) at the rate of 8% per annum from the date of breach to the date of full and final payment;

(vii) Interest for prayer (ii) and (iii) at the rate of 8% per annum from the date of filing to the date of full and final payment;

(viii) Costs; and

(ix) Any other relief or directions which the Honourable Court deems fit and proper.

[5] The matter proceeded to trial and judgment was delivered by Abdul Wahab Patail J on 6 October 2009 on the following terms:

(i) that the defendant pay to the plaintiff the sum of RM231,349.56; and

(ii) damages to be assessed by the Registrar.

[6] The order made no provision for post-judgment interest. Neither did His Lordship's grounds of judgment mention or discuss post-judgment interest although it was expressly prayed for by the plaintiff in its statement of claim. Neither did His Lordship reject the plaintiff's claim for post-judgment interest in his grounds.

[7] Upon service of a statutory notice pursuant to s. 218 of the Companies Act 1965 which included interest at 8% per annum on the judgment sum, the defendant only made payment of the judgment sum of RM231,349.56 as per the order of 6 October 2009. The defendant however declined to pay 8% post-judgment interest amounting to RM44,114.88 demanded by the plaintiff.

[8] The defendant took the position that the plaintiff was not entitled to demand post-judgment interest as it was not awarded by the court in the judgment. On 25 April 2012 the defendant filed Suit No: 24NCVC-1012-04-2012 for an injunction to restrain the plaintiff from presenting a winding-up petition on the basis that the s. 218 notice was defective for making a demand that did not accord with the order of the court.

[9] On 30 May 2012 John Louis O'Hara J granted the injunction sought by the defendant.

[10] The plaintiff then filed this application in March 2013 for an order under the slip rule to correct the order of 6 October 2009 to include post-judgment interest of 8% pursuant to O. 42 r. 12 of the Rules of the High Court 1980 to be imposed on the decretal sum of RM231,349.56. The application was based on the ground that there had been an accidental omission to consider the claim for interest.

Arguments Of The Parties

[11] The defendant opposed the application on two principal grounds. First, that the application was barred by the doctrine of *res judicata* as John Louis O'Hara J has already decided that the plaintiff was not entitled to claim interest on the judgment of 6 October 2009. He pointed out that the defendant's application for an injunction was allowed by the court premised on the ground that the plaintiff was not entitled to post-judgment interest.

Second, that the application did not come within the scope of the slip rule as the said order expressed the intention of the court, there being no slip or omission.

[12] In response, the plaintiff contended that accidental omissions may be corrected under the slip rule as it was evident from the order and grounds of judgment of Abdul Wahab Patail J that His Lordship had not refused post-judgment interest but, had merely omitted to address his mind to the issue of interest. It was said that in the absence of any indication in the judgment that the issue of interest had been considered and rejected, the plaintiff was entitled to invoke the slip rule to have the judgment corrected. Strong reliance was placed on the decision of the Court of Appeal in *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 2 CLJ 665; [1998] 2 MLJ 158 ("*Adong*'s case") in support of this proposition.

The Law

[13] Order 20 r. 11 of the ROC states:

> Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by a notice of application without an appeal.

[14] It is trite law that where the formal judgment does not accord with an oral judgment delivered in open court or when the formal judgment overlooks or accidentally omits a matter on which the court pronounced or disposed of, it can be corrected under the slip rule.

[15] The slip rule also permits a judgment to be corrected if there are accidental omissions to make it consistent with the judgment it meant to pronounce but had overlooked. The question as to what are the accidental omissions that can be corrected under the slip rule have been considered and decided in a variety of instances. In *Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd* [1994] 1 CLJ 412, the plaintiff applied to amend a judgment to include post-judgment interest. The defendant objected on the ground that since the judgment made no reference to interest, it indicated that the court was not minded to grant such interest

and that the omission to grant interest was neither inadvertent nor accidental. In allowing the application under the slip rule, Steve LK Shim J said (at p. 413):

> Now, I think that in this application the Privy Council case of *Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co.* [1973] 1 All ER 569 has particular relevance. The factual situation in that case is not entirely dissimilar to the instant case. There, the respondents brought an action against the appellants in the Supreme Court of Hong Kong. By their statement of claim the respondents claimed a balance sum and interest thereon. Pickering J gave judgment in favour of the respondent on the issue of liability, the amount owing to be assessed but omitted to make an award of interest. The judgment was not read but handed down in open Court and the omission was not noticed by Counsel before leaving Court. A few days after the balance sum was assessed, the respondents applied by summons *inter partes* for an order that interest should be paid by the appellants on that sum. The summons was heard by another Judge, Briggs J in chambers and he dismissed it on the ground that he had no jurisdiction to make such an award. Subsequently the respondents applied by notice of motion for an order that Pickering J's judgment be amended under the slip rule by the inclusion of an award of interest. This application was heard by Pickering J and he decided that the correction should be made. His decision was affirmed by the full Court. From that decision, the appellants appealed to the Privy Council. The Privy Council held that the order correcting his judgment had been properly made by Pickering J. In holding thus, Lord Pearson J in the Supreme Court of Hong Kong who said as follows:
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> > A most important matter for me to consider is what I would have done at the time I gave judgment had this matter of interest been in my mind. After a lengthy trial, in the course of which both sides asked me to confine my decision to the issue of liability, and having written a long judgment which occasioned to me no small difficulty, my mind was on the issue of liability rather than upon any figures. But had I thought the matter through further, as I should have done, I am in no doubt whatever … that I would have made an award of interest.
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> Taking the cue from Pickering J. I have to state that in the instant case, my mind was primarily drawn to the lengthy arguments and submissions of Counsel for the parties concerned which had concentrated essentially on matters other than on

> interest. Not unnaturally therefore my judgment was confined to the issues canvassed before me. Nevertheless, had the matter of interest been raised by Dr. Chew at the time I delivered judgment, I would have granted it. In the circumstances and having regard to O. 42 r. 12, I will allow this application and order that the judgment dated 15 May 1993 be amended to include an award of interest on the judgment sum at rate of 8% per annum from date of judgment until it is satisfied. There will be no order as to cost on this application.

[16] Similar judicial pronouncements are found in the case of *Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd* [1998] 1 LNS 336; [1998] 7 MLJ 81 where the plaintiff applied to amend an order for sale under the slip rule to include a specific date for the sale of the charged property. The defendant objected on the ground that the slip rule did not apply as the said order was null and void as it had been obtained in breach of s. 257(1) of the National Land Code. In allowing the application, Kamalanathan Ratnam J said (at p. 87) (MLJ):

> There is no doubt that if a judge is addressed on a particular issue and having directed his mind to that issue, he decides upon it, there can certainly be no alteration under this slip rule, even if the learned judge had fallen into an obvious error in principle. Clearly, therefore I can and ought to allow the application to amend the order under the slip rule.
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> Having read the originating summons and the eventual order for sale, I am convinced that at all material times the plaintiff intended that the court do specify a date for the sale of the charged property by auction, such date being a date not less than one month from the date of the order for sale. There was clearly an oversight and an accidental slip or omission on the part of counsel to request for a specific date. Further, I am satisfied that had the issue of the specific date of the sale been brought up before me on the hearing of the originating summons on 11 March 1998, I would have no hesitation in specifying the date for the sale.

[17] I now turn to examine the *Adong*'s case which was cited by counsel for the plaintiff. In that case, the plaintiffs obtained judgment against the defendant which did not include post-judgment interest and where the trial judge did not deal with the

issue of post-judgment interest in his grounds of judgment. Gopal Sri Ram JCA in awarding the plaintiff post-judgment interest, explained (at p. 673 (CLJ); p. 165 (MLJ)):

> Turning now to the issue of interest, it is now well recognized that the purpose of an award of interest is to compensate a plaintiff who has been kept out of money that was lawfully due to him. Of course, a court of justice is entitled to deprive a successful party of interest on a monetary claim. But it must clearly state its reasons for doing so. In the present instance, there is no indication anywhere in the learned judge's judgment that he had refused an award of interest in the exercise of his discretion. Indeed there was no exercise of discretion at all on the question of interest. Consequently, this is a proper case where this court is entitled to exercise a discretion of its own. It is clear from the finding of the learned judge, with which we have expressed our unqualified agreement, that the respondents were entitled to be compensated for the deprivation of their livelihood. They ought to have been paid the compensation so soon as the wrong was done them. Taking into account all relevant circumstances of the case, and in the exercise of our discretion, we ordered the appellants to pay interest at the rate of 8% p.a. upon the sum awarded by the judge from the date of the respondents' originating summons, that is to say, from 4 November 1994 until the date of payment.

[18] These cases illustrate the principle that when it is apparent that a matter that ought to have been considered by the court has been accidentally overlooked by counsel and/or the court, the court is possessed of the power under the slip rule to correct the judgment.

Analysis

[19] As for the objection based on *res judicata*. It is trite that a plea of *res judicata* is based on the principle that a person is not to be permitted to litigate a second time what has already been decided against him in another case. See *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57. I find that the principle has no application to the factual matrix of the present case. It is crucial to note that the issue that was raised before John Louis O'Hara J concerned the question of whether the plaintiff was entitled to post-judgment interest based on the order of 6 October 2009 as drawn up and faired.

His Lordship did not consider whether it was permissible for the plaintiff to amend its judgment under the slip rule to claim interest as prayed for in the statement of claim. There was no adjudication on the issue of the plaintiff's claim for interest, there being only a denial of interest based on the order as drawn up.

[20] Thus, this is not a case in which the plaintiff seeks to relitigate an issue that it has already argued and lost. This is a case where the plaintiff is seeking to raise an issue for the first time that it is entitled to claim post-judgment interest on the judgment sum under the slip rule on the ground of accidental omission. I therefore find no merit in the first objection.

[21] On the second point of whether the correction of a fair order to include post-judgment interest comes within the scope and ambit of the slip rule, I am in agreement with the guiding principle found in the passages that I have quoted from the three cases discussed above. It is significant to note that there is no indication anywhere in Abdul Wahab J's judgment that he had considered and refused an award of interest. In the circumstances, it is clear that the court has power to correct the judgment to allow the plaintiff as the successful party to the suit to interest on the judgment sum as it is apparent from the records that it was not considered and disallowed.

[22] Before I conclude, I must deal with an important issue that troubled me when the application came before me. It is the question of whether the application of the slip rule only permits a judgment to be corrected by the same judge who pronounced it. It is not without significance that in the *Kalimantan* and *Oriental Bank* (*supra*), the applications to correct the accidental omissions in these judgments came before the same judges who had pronounced the same. There appears to be no decided case on this point offering any guidance on this question.

[23] After giving the matter considerable thought, I was persuaded that whilst it is far better for an application to correct a judgment based on an accidental omission to be heard by the same judge who made the order, there may be instances when he or she is not available. If the judge who made the order is not available, due to retirement or transfer or other reasons, the ends of justice demand that a different judge must have the jurisdiction

to hear the application as otherwise the judgment would remain uncorrected and in some circumstances unenforceable. There is nothing in O. 20 r. 11 of the ROC which expressly or impliedly prohibit a different judge from hearing the application and doing the needful to correct what is an obvious error or omission. Order 20 r. 11 refers to "the court" not the same judge.

[24] In the present case it is common ground the trial judge has been elevated to the Court of Appeal. In the circumstances, I do not think there exists any legal impediment to prevent me from hearing the application.

Conclusion

[25] For the reasons given, I am satisfied that the requirements for acting under the slip rule were satisfied. I therefore allow the application with no order as to costs.